

THE VOLKERS CASE

EXAMINING THE CONDUCT
OF THE POLICE AND PROSECUTION

MARCH 2003



EXECUTIVE SUMMARY

BACKGROUND TO THE VOLKERS CASE

On 26 March 2002, following a police investigation that began in August 2001, internationally renowned swimming coach Scott Volkens was arrested on charges of indecent dealing with children under the age of 16 years. The arrest received extensive media coverage with reporters photographing Mr Volkens as he arrived at Police Headquarters after his arrest.

The police brief of evidence was sent to the Office of the Director of Public Prosecutions (ODPP) on or about 4 June 2002. Medical evidence from one Complainant was provided to the ODPP and Mr Volkens's legal representatives on 22 July 2002. On 25 July 2002, Mr Volkens was committed to stand trial on seven charges of indecently dealing with a child under the age of 16 years in relation to three Complainants.

On 6 September 2002, Mr Volkens's legal representatives — Mr Peter Shields, solicitor, of Messrs Ryan & Bosscher Lawyers and Mr Michael Byrne QC, Barrister-at-Law — approached the DPP to discuss Mr Volkens's case. A meeting was held with Mr Byrne and Mr Shields and several ODPP officers, including Deputy DPP Paul Rutledge, at which a written submission was presented. The submission argued that consideration be given to discontinuing the prosecution against Mr Volkens. Mr Shields later gave the Deputy DPP statements in support of the submission, but subject to him giving an undertaking as to how they could be used.

On 18 September 2002, the ODPP notified the three Complainants and Mr Byrne that the prosecution against Mr Volkens would be discontinued.

This decision received extensive media coverage.

On 20 September, Mr Bosscher of Messrs Ryan & Bosscher Lawyers made a submission to the Attorney-General on behalf of Mr Volkens seeking an ex gratia payment for the expense and hardship suffered by Mr Volkens as a result of the charges against him.

Also on 20 September 2002, Mr Shields made comments in the media, indicating that the new evidence presented to the DPP proved that the alleged incidents could not have taken place and suggesting that Mr Volkens might bring defamation actions against the Complainants. On 21 September 2002, Mr Shields further commented to the media, this time questioning the thoroughness of the police investigation.

Between 24 and 25 September 2002, comments were reported in the media by various politicians, academics and lawyers regarding the police investigation and the appropriateness of the undertaking given by the Deputy DPP.

Complainant 3 was reported on 26 September 2002 as having concerns regarding the decision to drop the charges and the alleged undertaking given to Mr Byrne and Mr Shields by the Deputy DPP.

Since that time there has been continuing media interest in the matter, with comments made by the lawyers for Mr Volkens, the Complainants, and various politicians, academics and lawyers.

ROLE OF THE CMC

The CMC's role was to find out whether there was any misconduct in the handling of the initial police investigation, or in the processes that led to the

decision by the DPP, including any evidence of political interference.

As the CMC has no authority to disturb or confirm the decision of the DPP to discontinue proceedings against Mr Volkens, it did not question whether the decision was correct or not. However, the basis on which the DPP came to her conclusion is relevant to the CMC's deliberations because it bears upon the question of whether there was any evidence of official misconduct on the part of any officer in the ODPP.

In light of the focus of the CMC's inquiries and the limits of its jurisdiction, it is important to record that the conclusions reached by the CMC are not intended to suggest in any way — express or implied — that Mr Volkens committed any offence. Further, the CMC should not be taken as having formed any favourable or unfavourable view of the allegations made against Mr Volkens by the three Complainants.

CMC RESEARCH REPORT

As a direct result of public concerns arising from the Volkens case, the CMC also considered the following issues:

- 1 The training, expertise and supervision of police officers responsible for the investigation of sexual offences.
- 2 The adequacy of existing guidelines and procedures for the initiation and discontinuance of the prosecution of sexual offenders by police and the DPP.
- 3 The appropriateness of, and the circumstances in which, the publication of identifying information about a person charged with a sexual offence should be suppressed.

On 20 and 21 November 2002 the CMC conducted public hearings regarding the above three issues, and received numerous submissions from government agencies, community organisations, professional bodies and private individuals. *The findings of the public hearings will be published shortly in a separate report.*

WHAT THE COMPLAINANTS ALLEGED

To put the Volkens case in perspective, it is necessary to explain the nature of the original allegations.

The police investigation began when a young woman and her parents approached the police with allegations that Mr Volkens had sexually molested her when she was a child and he her swimming coach. The young woman gave the name of another woman who, she said, had been similarly treated by Mr Volkens. Police approached that woman, who made a statement in November 2001. A third woman came forward in April 2002, after Mr Volkens's arrest. Of the three women, her allegations were the most serious.

All the incidents were alleged to have happened between 1984 and 1986 when the women were girls aged between 12 and 16 years. There were no eyewitnesses to the alleged incidents, two of which were said to have occurred in Mr Volkens's house, one in his car, two in a massage room near the pool where the girls trained, and two in Mr Volkens's caravan, also near the pool. An eighth charge was dropped early on for insufficient grounds on which to proceed.

CONCLUSIONS

Regarding the police investigation

The CMC investigation did not disclose any evidence of misconduct on the part of any officer of the QPS. However, it makes the following observations.

Some Taskforce Argos officers were under the misapprehension that there was a policy that alleged offenders accused of committing sexual offences must be arrested (rather than serving a less intrusive notice to appear). The QPS should ensure that all officers are fully aware that they must adopt a case-by-case approach to the decision to arrest alleged offenders, as required by section 198 of the Police Powers and Responsibilities Act.

The State Crime Operations Command assessment highlighted some concerns about the thoroughness and standard of the police investigation. These concerns mainly relate to poor supervision and the inexperience of the arresting officer, which the QPS proposes to address managerially. However, many other criticisms about the police investigation — such as the failure of police to interview at least two important witnesses — were unfounded. In any event, these matters did not raise evidence of police misconduct or official misconduct.

Regarding the handling of the case by the ODPP

The CMC investigation did not disclose any evidence of official misconduct on the part of any officer of the ODPP. However, it makes the following observations.

In the CMC's view, the process leading to the decision not to continue with the prosecution of any of the charges against Mr Volkens was unsatisfactory. This was reflected in the fact that there is room for doubt about the principal reasons that motivated the decision.

The decision by Mr Rutledge to accept statements proffered with a view to persuading him that the charges could not be upheld, on the basis that use of the statements was restricted, was a mistake.

There are obvious dangers in permitting lawyers to submit statements to the prosecution in this way. Here the situation was aggravated by the circumstances that disagreement quickly arose as to the basis on which the statements were to be used; this led to a threat of litigation by the lawyers for Mr Volkens, which undoubtedly put pressure on the officers of the ODPP. Although there is evidence from the DPP and Mr Rutledge that the content of the statements had very little to do with the ultimate decision, it is hard to accept that the statements did not influence the decision. Such a conclusion should not be taken as meaning that the DPP and Deputy DPP were untruthful in their responses.

Apart from the acceptance of the statements subject to some disputed obligation not to investigate them, other mistakes of lesser importance were made, namely:

- The DPP was under a misapprehension as to the length of time Complainant 3 had said that Mr Volkens was away from the pool.
- Too much was made of the damage supposedly done to Complainant 3's credibility by remarks attributed to Witness K.
- There was little, if any, analysis of the prospects of a successful prosecution of the offences alleged to have occurred in the caravan, including any consideration of whether to proceed on the allegations in respect of the caravan incidents alone.
- Too little attention was given to the possibility that Complainant 3 might simply be believed by a jury.

In short, there were more defects than one would normally expect to find in an examination of a matter of this kind. However, it appears clear that although Mr Rutledge, and to a lesser extent the DPP, can be justly criticised for the way in which they went about their task, the case falls far short of being one of official misconduct.

The DPP should consider developing guidelines in relation to the giving and recording of undertakings to ensure that the situation that occurred in the Volkers case is not repeated.

Given that on a number of occasions, the Complainants expressed their concern at what they perceived to be a lack of communication on the part of the ODPP, the DPP should consider reviewing the adequacy and effectiveness of the ODPP's communication with complainants. *A detailed consideration of the relationship between complainants and the ODPP will be provided in the CMC's forthcoming research report.*

OTHER CRITICISMS AND THE CMC'S CONCLUSIONS

The following is a list of specific criticisms made in relation to this complex case with cross-references to where each matter is discussed in full in the report. Summaries of the CMC's conclusions appear in bold type.

- ***police failing to interview all relevant witnesses (page 8)***

The police investigation was criticised by Mr Byrne, Mr Shields, Mr Bosscher and the ODPP for failing to interview all relevant witnesses, some of whom it was argued would have cast doubt on the credibility of the Complainants' accounts.

The investigating officers concede and the QPS officers who conducted the post-operational assessment conclude that more swimmers should have been interviewed. However, the assessment found no evidence of misconduct in the failure to conduct further interviews. The CMC concurs that there is no evidence of misconduct.

One witness, Witness K, told the police that she was assisting the Defence and did not wish to speak to the police. In these circumstances, it is understandable that the police decided not to attempt to contact this witness again.

- ***police failing to take statements from all witnesses interviewed (page 9)***

Mr Bosscher's submission to the CMC stated that a number of the witnesses to whom Mr Volkers's legal representatives had spoken had provided information that discredited the Complainants. The submission claimed that, although these witnesses were considered and in some cases interviewed by police, statements had not been taken from them.

The reasons for the police not taking statements from some witnesses vary. Suffice to say that in none of these cases was the conduct of the police such that any disciplinary action is warranted.

- ***police failing to consider conflicting testimony (page 12)***

A further issue raised by Mr Bosscher's submission to the CMC concerned the apparent failure by police to identify evidence that would either corroborate the Complainants' evidence or exonerate his client. In the submission for an ex gratia payment, particular

reference was made to evidence provided to police by Complainants 1 and 2. Both women had referred in their statements to a meeting between them at 'Aladdin on Ice' at the Brisbane Entertainment Centre. It was submitted by Mr Bosscher that the correct name of the show was in fact 'Disney on Ice', implying that the shared mistake by the two Complainants was a concoction on their part, which should have alerted police to possible flaws in the case prior to the laying of charges.

CMC inquiries found that newspaper reviews referred to the production as 'Aladdin on Ice'. In the circumstances, the suggestion that police investigating the complaints failed to identify a shared mistake in the statements of the two Complainants, which could amount to evidence of concoction, is without merit.

- ***police failing to obtain and examine Complainants' medical records (page 13)***

Concerns were raised by Mr Byrne's submission to the ODPP, the submission for an ex gratia payment, and the ODPP regarding the failure by investigating police to obtain and properly examine the psychiatric records of the Complainants at an early stage in the investigation. This failure was particularly important in relation to Complainant 1.

If the complete medical history of Complainant 1, including psychiatric records, had been obtained and reviewed by police at an early stage, it could have been taken into account in assessing her credibility. However, given the lack of a directive regarding the obtaining of such evidence, the criticism of police for not obtaining the medical records at an earlier date is unjustified.

The CMC notes the difficulties involved in formulating prescriptive guidelines for the timing of the collection of medical evidence in all cases, as each case turns on its own facts. There will be some cases where medical evidence is quite irrelevant. It may be that earlier consultation on sexual offence cases between the QPS and the ODPP would assist in the earlier identification of the relevance of certain types of evidence. *This issue is canvassed at length in the forthcoming research report.*

- ***police arresting Mr Volkens (page 14)***

Mr Bosscher's submission to the CMC expressed concern regarding the actions of the police in arresting Mr Volkens rather than issuing him with a notice to appear. The submission stated that Mr Volkens was arrested in a way so as to 'cause maximum embarrassment and discomfort' to Mr Volkens.

There is no basis to conclude that Detective Senior Constable Shepherd (the arresting officer) did not believe that it was reasonably necessary in this particular case to arrest Mr Volkens, albeit that this was in line with his invariable practice in relation to sexual offences. The QPS should, however, ensure that all officers are fully aware that they must adopt a case-by-case consideration of the decision to arrest alleged offenders, as required by section 198 of the Police Powers and Responsibilities Act. The CMC has already written to the QPS about this issue.

- ***police giving Courier-Mail journalists a 'tip-off' (page 17)***

Mr Bosscher's submission also suggested that the *Courier-Mail* had received a 'tip off' about Mr Volkers's imminent arrest.

There is evidence that two police officers associated with the Volkers investigation did enter into an arrangement with the *Courier-Mail*, contrary to guidelines set down in the Operational Procedures Manual. The CMC supports the ESC's recommendation that disciplinary action for misconduct be considered against these two officers.

- ***senior police failing to supervise the arresting officer (page 17)***

Mr Bosscher's submission to the CMC contended that senior police failed to supervise the arresting officer properly, resulting in the matter proceeding in a less than even-handed manner.

The post-operational assessment of the police investigation concluded that there had been poor quality control and supervision, neither of which, however, amounts to official misconduct or police misconduct.

- ***arresting officer failing to show objectivity (page 18)***

Concerns were also raised by Mr Byrne and Mr Shields about the evidence given by Detective Senior Constable Shepherd during the committal before the Magistrates Court. They submitted that the evidence was misleading in a number of respects and was patently incorrect about the assertion that Mr Volkers had made admissions to some of the offences with which he was charged.

There is no evidence to suggest that the answers provided by Detective Senior Constable Shepherd were a deliberate attempt to mislead the Defence or the court, or that they demonstrated a lack of objectivity on his part.

- ***use of a blackboard (page 54)***

Complainant 3 said that she was concerned that the DPP must have questioned her credibility because she appeared to disbelieve her evidence that there was a blackboard at the pool. She said that she gave a photograph to Mr Davies that proved that there was a blackboard at the pool. She believed that witness statements provided by Mr Byrne and Mr Shields said there was not a blackboard.

Complainant 3 relies on the photograph that she produced to prove that there was a blackboard at the pool. However, proof of the existence of the blackboard is irrelevant because no-one has said that it did not exist. Those people who provided statements to Mr Shields and addressed this issue merely say that Mr Volkers did not use one, not that one did not exist. Neither Mr Davies nor Detective Sergeant Marsh told Complainant 3 that witnesses had said that there was no blackboard, but that 'some people said he never used a blackboard'. Complainant 3 said he did not use a blackboard very often.

- ***Inconsistency of evidence over type of floor coverings (page 56)***

The Shadow Minister for Police and Corrective Services, Mr Johnson, expressed concerns about alleged comments made by Mr Rutledge in a meeting with Complainant 3 on 26 September 2002. Those comments related to an alleged inconsistency in the evidence of Complainants 1 and 2 relating to the type of floor coverings at the former residence of Mr Volkers. (Complainant 1 alleged that the house had polished floors while Complainant 2 alleged that the house had grey carpet.) Mr Rutledge allegedly said that this inconsistency constituted 'yet another reason why the charges against Mr Volkers could not proceed to trial.'

Mr Johnson further stated that he has been informed that the current owner of the Volkers residence told Mr Jason Davies and Detective Sergeant Marsh that Volkers had installed grey carpets over the top of the polished floors on 17 September 1986. Mr Johnson said that this information 'would appear to more than adequately cater for Mr Rutledge's concerns regarding the allegedly inconsistent recollection' of Complainants 1 and 2. He further stated that he had received information that:

- Mr Davies and Detective Sergeant Marsh were informed of these facts by the owner of the residence
- Mr Davies and Detective Sergeant Marsh took photographs of the interior of the residence showing the grey carpet over the floorboards.

Mr Johnson raised concerns that Mr Rutledge failed to acknowledge these facts in his meeting with Complainant 3.

There is evidence that Mr Davies was aware of the issue of the floor coverings and, at the direction of the DPP and the Deputy DPP, he and Detective Sergeant Marsh conducted inquiries.

He could not recall being told by the current owner of the precise date on which the coverings were laid (the owner told the CMC that she did not tell them the date on which the carpet was laid as it was, and still is, unknown to her). Because the date of installation could not be established, it meant that there was a potential inconsistency in Complainant 1's evidence.

In any event, Mr Davies did not consider that it was a significant issue in the DPP's decision to discontinue proceedings in respect of either Complainant 1 or Complainant 2. In the interviews with the CMC, it was never referred to by the DPP or the Deputy DPP as being relevant to their considerations.

In the CMC's view, any potential inconsistency was of little, if any, significance to the DPP's considerations. Even if the inconsistency had been taken into account by the DPP, it was not a matter that could constitute official misconduct.

- ***TV program's prior knowledge of discontinuance (page 60)***

The Leader of the Opposition asked the CMC to find out why the television program '60 Minutes' was informed of the discontinuance by an employee of a public relations firm representing Mr Volkers weeks before the DPP had made her decision.

There is no evidence that any employee of the public relations firm acting for Mr Volkers knew about the DPP's actual decision, though certainly the employee knew about the possibility of such a decision. It is clear from the evidence that the DPP had determined that no-one, including Mr Volkers, would be advised of her decision until after all three Complainants had been notified.

- ***The selection of Detective Sergeant Marsh (page 61)***

In correspondence to the CMC, the Opposition brought to the CMC's attention, 'potential political interference [relating to] Ms Leanne Clare's selection of Detective Marsh to investigate the "new" evidence supplied by the defence following public criticism of Detective Shepherd by Mr Shields'. The Opposition said that it has been informed that Detective Sergeant Marsh went to school with Mr Shields and did not tell the DPP at the time of his selection. The Opposition went on to say that he had been sidelined from any further investigations by the QPS in the Volkens matter because of concerns that he would leak information to Mr Shields. The Opposition called for scrutiny of the DPP's decision to select Detective Sergeant Marsh.

In the CMC's view, the approach by the DPP to the QPS seems perfectly sensible and appropriate. Detective Sergeant Marsh was the arresting officer's supervisor and had knowledge of the investigation. On the basis of this analysis, there was no reason for Detective Sergeant Marsh to be excluded from conducting these inquiries and there is simply no evidence that he acted improperly or was asked by any person to act improperly.

- ***Media advice of discontinuance (page 62)***

Mr Volkens's legal representatives were concerned that the media appeared to know about the decision to drop the charges against Mr Volkens before the Defence did.

By the time that Mr Byrne was advised of the DPP's decision, the three Complainants, some officers of the QPS, and the relevant officers of the ODPP had already, and quite properly, been informed. It is not surprising, therefore, that the media heard 'rumours as to what was going on'. There is no evidence that anyone leaked information of the decision to the media.

- ***Failure to appoint an experienced prosecutor (page 63)***

Mr Bosscher expressed the opinion that, had an experienced prosecutor being appointed to the Volkens case at an early stage, the decision to discontinue criminal proceedings would have been made earlier.

Prior to the committal on 25 July 2002, the brief of evidence had been briefly reviewed by a case officer and then by an experienced crown prosecutor, Mr Pointing. There is no reason to think that a consideration of that same evidence by a 'more experienced prosecutor' would have led to the criminal proceedings against Mr Volkens being discontinued at an earlier stage.

- ***Removal of senior prosecutor (page 64)***

All three Complainants were disturbed by the apparent removal of a senior prosecutor from the case, namely Mr Salvatore Vasta.

Mr Vasta did provide some advice to police on the Volkens case, but was never assigned the case and, therefore, was never removed from it.

The DPP is in the process of formulating guidelines to regulate the provision of advice to police by prosecutors prior to cases being formally referred to the ODPP. The CMC supports this initiative by the DPP.

- ***Confiscation of material (page 64)***

The Complainants expressed concern that documents and tapes in relation to the investigation were taken away from Detective Senior Constable Shepherd after the decision to discontinue criminal proceedings against Mr Volkens.

There was nothing untoward in the removal of this material. After the charges against Mr Volkens were dropped, a post-operational assessment of the investigation was ordered by the QPS and the reviewing officers were authorised to obtain access to all relevant material.

- ***Decision made 'in haste' (page 65)***

The Complainants suggested that the fact that Mr Volkens was wanting to apply for a coaching position with the Australian Institute of Sport may have been the reason for the speed of the decision.

The mere fact that the decision not to prosecute was made within twelve days of the submission being made to the ODPP, and two days after the DPP was advised of Mr Volkens's job application, is not evidence of official misconduct. Ms Clare made it clear to the ODPP that she would not be influenced by the timing of the job application. Senior Sergeant Marsh had been seconded to the ODPP for the week and Ms Clare had advised the QPS that she intended to have the investigations completed before 19 September 2002, pending her going on leave. There is no evidence that the decision to move promptly on this matter and communicate the decision once it was made was improperly motivated or constitutes official misconduct.

- ***Communication of the discontinuance to Complainants 1 and 2 (page 65)***

The Leader of the Opposition criticised the way the ODPP informed the Complainants, particularly Complainant 1, of the decision to discontinue the Volkens prosecution, describing the ODPP as having 'no appreciation ... of the level of sensitivity required in the handling of these matters'.

There is no evidence of official misconduct in relation to the manner in which the ODPP communicated the decision to Complainants. Mr Davies told the CMC that prior to seeing Complainant 1 he spoke to her treating doctor to determine the best way to advise her of the DPP's decision.

- ***Prosecutor's 'disinterested' attitude (page 66)***

Complainant 3 said she believed the prosecutor assigned to prosecute the committal hearing appeared 'disinterested' in her complaint. She based this perception on her contact with the Crown Prosecutor, Mr Pointing, at the meeting on the day before the committal and during the committal itself. She felt that he had little empathy for her.

Mr Pointing rejected this description of him and explained that it was his duty as a prosecutor to prosecute matters dispassionately; to be firm but fair. The perceived attitude of the Crown Prosecutor could not amount to official misconduct, and any concerns of this nature are a matter for consideration by the DPP.

- ***Distressful comment by the Deputy DPP (page 67)***

Complainant 3 related her distress over a comment alleged to have been made to her and her solicitor by Mr Rutledge during the meeting regarding the media furore that resulted from the DPP's dropping of the charges, namely: ' I didn't believe I would have had to waste as much time on this as I have — maybe I would have been better to have gone to trial'.

The alleged comment, if accurately reported, does not of itself indicate official misconduct by Mr Rutledge.

- ***The 'selectivity' of the Defence statements (page 68)***

According to Complainant 3, in a radio interview on 24 September 2002, Mr Shields had said that he had collected 30 statements in relation to the Volkers case. Given that Mr Shields actually gave the Deputy DPP 20 statements, Complainant 3 said that she was concerned that the statements provided to the Deputy DPP were selective and were not all the statements in the possession of Mr Volkers's lawyers.

There is conflicting evidence as to whether Mr Shields agreed to provide all of the statements in his possession to the Deputy DPP or merely a representative sample of them. This conflict could not be resolved by the CMC. In any event, the circumstances could not constitute official misconduct.

- ***Alleged political involvement***

The Opposition asked the CMC to consider the role of government members in the Volkers case to ensure that no impropriety or conflict of interest had occurred.

The CMC found no evidence of outside interference in the decision-making process of the DPP by any member of government or any other person. Both police and ODPP officers involved in the investigation and prosecution of Mr Volkers were categorical in their assertions that no undue influence was brought to bear on them by any person over the Volkers case.